No. 4056

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

RUTH HAZELTON,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

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INDEX

TABLE OF CASES

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STATEMENT OF THE CASE.

Plaintiff in error is charged with violation of the National Prohibition Act. The information is as follows:

(Title of Court and Cause.)

Information.

No. 1816.

E. G. DAVIS, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own person comes into Court on this 27th day of December, 1922, and with leave of the Court first had and obtained upon his official oath gives the Court here to understand and to be informed as follows:

COUNT ONE.

(Possession.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce, in the Central Division of the District of Idaho and within the jurisdiction of this Court did then and there wilfully, knowingly, and unlawfully have in her possession certain intoxicating liquor containing more that one-half of one per cent of alcohol, to-wit: one pint of a certain spiritous liquor commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and

unlawful and contrary to the form of the statute in cases made and provided, and against the peace and dignity of the United States of America.

COUNT TWO.

(Sale.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: on or about the 6th day of November, 1922, at Lewiston, Idaho, in the said County of Nez Perce in the Central Division of the District of Idaho and within the jurisdiction of this Court did then and there wilfully, knowingly and unlawfully sell a quantity of intoxicating liquor containing more than one-half of one per cent of alcohal, to-wit: one pint of a certain spiritous liquor, commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, the sale of same being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

(Nuisance.)

That Ruth Hazelton, late of the County of Nez Perce, State of Idaho, heretofore, to-wit: between

June 1, 1922, and December 1, 1922, at Lewiston, Idaho, in the said County of Nez Perce in the Central Division of the District of Idaho, and within the jurisdiction of this Court did then and there wilfully, knowingly and unlawfully maintain and keep and operate the Central Hotel, located on Lot 3 of Block 30 in the said City of Lewiston, Nez Perce County, Idaho, as a public and common nuisance as a place wherein intoxicating liquors containing more than one-half of one per cent of alcohol, to-wit: certain spiritous liquors commonly known as "moonshine whiskey," the same being designed, intended and fit for use as a beverage, were sold, kept and bartered, the said acts and things herein charged being then and there prohibited and unlawful and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for
the District of Idaho.

We direct the attention of this Court to the fact that the time for the commission of the alleged facts set forth in the first two Counts is November 6th, 1922, and in the third Count the time is fixed as between June 1, 1922, and December 1, 1922.

The jury acquitted on the first and second Counts and found the defendant guilty on the third. At the outset, we take the position that the acquittal of the plaintiff in error on the first and second Counts and her conviction on the third Count creates such an inconsistency as requires a reversal of the judgment. While we appreciate the fact that the Federal Courts have frequently held that an acquittal of defendant on counts of possession and sale and a conviction on a count of maintaining a nuisance does not necessarily create an inconsistency in the verdict, we do contend that an inconsistency does arise in those cases where the acts embraced in the Counts of possession and sale must necessarily be established before a conviction may follow on the third Count, that of maintaining a nuisance. We are convinced that a careful reading of the entire record in this case leads irrevocably to the conclusion that the government manifestly relied on the evidence of the Prohibition Agent, Mr. Marler, to secure a conviction on all of the Counts set forth.

We proceed now to a discussion of the testimony of this gentleman. The substance of this testimony is as follows:

That he saw the defendant at the Central Hotel, at Lewiston, Idaho, on the 6th day of November. 1922. He fixed the time of his visit about noon of that day, at which time he testified she sold him a pint of moonshine whiskey. His cross-examination developed that he had never seen her prior to November 6th, but he is arbitrarily emphatic in his identification of her on that day. His testimony develops the strange proposition that he made no report of this transaction to his officials until about a month later, but immediately following the purchase of this liquor he filed a complaint against one Joyce Black, whom it will be shown later was operating the hotel at the time of his visit. This complaint was based upon the sale of the identical bottle that it is claimed he purchased from the plaintiff in error. The unreliability of his testimony further appears when it is considered that at the preliminary hearing held on the 5th day of December, the complaint on which the charge was based placed the commission of the offence on the 20th day of November. As we have heretofore stated, Marler was positive in his identification of

Mrs. Hazelton as being the person who sold him the liquor on the 6th day of November. He is primarily contradicted by the plaintiff in error who testified and proved conclusively that she was not in Lewiston and her testimony in this regard is corroborated by that of one Frances Jones, a maid in the hotel, also by the testimony of her husband.

The record is absolutely conclusive on the proposition that Mrs. Hazelton was not in Lewiston on the 6th day of November at the time Marler claims that he was at the Central Hotel. She and her husband had returned from a month's trip to the East, and arrived at Lewiston on the 5th day of November. In the forenoon of November 6th, and between nine and ten o'clock, they started in an automobile for Colton, Washington. They did not return to Lewiston until mid-afternoon. The government did not in any manner seek to contradict this testimony and it stands as a positive and substantial denial of the statement of the prohibition agent.

The testimony of Frances Jones, a witness for the plaintiff in error, which supports this proposition is as follows:

Q. State your name.

A. Frances Jones.

Q. Where do you reside, Mrs. Jones?

A. 227 Seventh Street, Lewiston, Idaho.

Q. About how long have you lived in Lewiston?

A. Pretty near three years.

Q. Were you acquainted with Mrs. Ruth Hazelton, the defendant in this case?

A. I am.

Q. About how long have you known her?

A. I guess about two and one-half years, just about.

Q. Do you work for her?

A. Yes, I do.

Q. In what capacity?

A. Maid.

Q. How long have you worked for her?

A. Going on two years and a half.

Q. I direct your attention, Mrs. Jones, to the month of October and the fore part of November of 1922. Do you recall of Mrs. Hazelton having taken a trip east during the month of October, that period of time?

A. Yes.

Q. Who was in charge of the place at the time she left or while she was away?

A. Well, it was a lady that I called "Babe," knew as "Babe."

Q. Do you recall when Mrs. Hazelton returned from the trip east?

A. I think it was on Sunday.

Q. That would be on the 5th or 6th of November?

A. Yes.

Q. 1922?

A. Yes.

* * * *

Q. Were you in the court room this morning when Mr. Marler, the Federal Agent, was testifying as to having purchased a bottle of liquor up there at the Central Hotel?

A. Yes.

Q. Are you the only colored maid that there is there?

A. Yes.

Q. I will ask you if you recall the episode as testified to by Mr. Marler, of his being there and purchasing a bottle of liquor from Babe or Joyce Black, and also saying that Mrs. Hazelton was there, do you recall that testimony?

A. Yes.

Q. Was the woman that was there with Babe Black Mrs. Hazelton, the defendant?

A. No.

Q. Who was she?

A. Well, I don't know her name.

Q. Had she been around the hotel for some time?

A. Well yes, she had been there, she roomed there.

Q. What room was she in, do you recall?

A. Room 5. (R. p. 62-66.)

While it may at first blush appear that her testimony in this regard was discredited by her cross-examination wherein she stated that she did not see Mr. Marler, her subsequent testimony after Mr. Marler had been recalled to the stand for the purpose of her identification of him proves that this maid was in the hotel at the time that Mr. Marler made his visit and that she saw him in conversation with Joyce Black and the woman who occupied Room 5.

Without setting forth in full the testimony of the

plaintiff in error or her husband, we invite the Court's attention to the record thereon, from which it must be concluded that the plaintiff in error was not in fact at the hotel at the time of Marler's visit, and that his was a case purely of mistaken identity.

Testimony of Mr. Hazelton touching this question is as follows:

Q. What time, Mr. Hazelton, did you leave for the east?

A. The 6th or 7th of October, 1922.

Q. Who went with you?

A. My wife, Mrs. Hazelton.

Q. And what time did you return?

A. On the afternoon of the 5th of November, 1922.

Q. Now you were there on the 6th of November, 1922, the date that the defendant is accused of selling a bottle of whiskey?

A. The morning of the 6th, yes, sir.

Q. State to the jury what time you and Mrs. Hazelton left, if you did at all, to go some other place.

A. Between nine and ten o'clock.

Q. And who was with you.

A. Mrs. Hazelton.

Q. You and her alone?

A. Yes, sir.

Q. How did you go?

A. In my car.

Q. And where did you go to?

A. We started for Colton but we only got about two-thirds up the hill, the spiral highway.

Q. What was the reason you didn't go to Colton?

A. We had a breakdown.

Q. How long were you detained there?

A. About two and a half or three hours, somewhere around there, possibly four hours altogether.

* * * *

Q. Did you finally get to Lewiston?

A. Finally, yes, sir.

Q. And what time was it?

A. I imagine about between probably two and three; I can't tell exactly; it was in the afternoon. (R. p. 85-87.)

The testimony of the plaintiff in error, Mrs. Hazelton, of course, is to the same effect.

Despite the fact that the jury has acquitted on the first two Counts, those of possession and sale, we have seen fit to set forth the testimony above stated for the reason that an examination of other testimony introduced by the government which we shall presently come to will lend the view that the government's case must stand or fall on the testimony of the Prohibition Agent.

We now address ourselves to the testimony of Sadie Samuelson, which it undoubtedly will be argued, was sufficient in and of itself to sustain conviction on the third Count. The substance of her testimony is to the effect that she first saw the defendant some time in October or November, 1922. The lady is not at all specific. Her first visit to the Central Hotel was for the purpose of purchasing a rooming house from the plaintiff in error. She had never been there before. When she went into the Central Hotel she stated that three men were sitting in a room; that they were buying drinks and that they bought one for her. According to her further statement she was up there on another occasion but she does not testify that on this subse-

quent occasion she purchased any liquor or saw any being sold. She has no recollection of whom she first spoke to with reference to the fact that the plaintiff in error was selling liquor in this hotel. She stated that she never talked with any government officer and furthermore she went voluntarily from Spokane, Washington, to Moscow, Idaho, for the purpose of giving testimony for the government against Mrs. Hazelton without knowing what she was going to testify to. The four men whom she alleges were buying liquor there on the occasion of her first visit were one Walter Miller, Jake Miller, one Fred Fren, and man by the name of Munday. None of these parties with the exception of Jake Miller appeared as witnesses in the case, either for or against the government. Testifying for the plaintiff in error, Jake Miller positively denied that he was in the hotel at the occasion referred to by the witness and further stated that during the time he had been rooming there, which was a period of some six months, that he had never seen any liquor sold on the premises. He was well acquainted with the witness, Sadie Samuelson, having worked for her, and thus we have her testimony thoroughly discredited and impeached by one of the parties whom

she claims was present on the ocacsion of her first visit.

We ask the Court's careful consideration of the testimony of this witness, Sadie Samuelson, for the reason that it will be contended as set forth above that it justified a conviction on the third Count. There can be no question but that ill-feeling existed between herself and the plaintiff in error over the purchase of a rooming house. She had bought a rooming house from the plaintiff in error and had paid thereon two hundred dollars, giving her notes for the balance. She later became dissatisfied with the deal, claiming there was a dispute over the lease and demanded of the plaintiff in error the return of her two hundred dollars. A week prior to the trial in the City of Lewiston she told the plaintiff in error that if the two hundred dollars was not returned to her that she would make it hot for her. She had made frequent demands for the return of the sum and not having received her money she became incensed at Mrs. Hazelton and took the opportunity presented by this trial to settle an old score.

The unreliability of her testimony is further developed when we consider her vague ramblings as to these alleged vists to the Central Hotel. In her direct examination she stated that she was up there

on two or three different occasions and that liquor was sold on each occasion and that she was there the night before the plaintiff in error left for the east and had a drink at that time. On cross-examination she testified that there were only two occasions that she saw any liquor when up there. When the whole nature of her testimony is considered and the undoubted fact that she was looking for opportunity to vent her spleen against Mrs. Hazelton and this coupled with her impeachment by Jake Miller, it must be concluded that her testimony was lacking in any degree of credence that would entitle a jury to pass upon the same.

In order to bolster its case, the government then called one W. H. Grasty, who testified to the effect that on the 2d day of November he was in the Central Hotel at Lewiston; that at said time and place he saw the plaintiff in error, Ruth Hazelton, and that he took a drink that had been purchased from Ruth Hazelton by another party. In his direct examination he does not give the name of this gentleman who made the purchase, but amply states that he had met him once before and that on this occasion he had come into town from Pullman or Colfax "or somewheres down the line." He closed his direct examination by a statement that he him-

self had purchased liquor from Mrs. Hazelton three days prior to that time.

In his cross-examination it was developed that he believed the name of the man to be Mishler, but on that proposition he would not be positive.

Mr. Mishler, on being called to the stand, flatly contradicted this witness by stating that he not only was not with Grasty in the Central Hotel at the time the later testified to but that on no occasion had he ever purchased liquor from Mrs. Hazelton, nor did he ever see Grasty make such a purchase.

It is somewhat remarkable that the two witnesses. whom the government will undoubteedly urge, adduced facts sufficient to sustain conviction on the third Count, were flatly contradicted by the very parties whom they claim to have been with when the sales of liquor were consummated.

The force of this impeaching testimony is better appreciated by a quotation from the record thereon. Mishler, on being called as a witness for the plaintiff in error, testified as follows:

Q. What is your name?

A. Asa Mishler.

Q. What is your occupation, Mr. Mishler?

A. Farming.

Q. In November, 1922, where were you living?

A. In Pullman.

Q. Pullman?

A. Yes.

Q. You heard the testimony of one William H. Grasty this morning on the witness stand?

A. Yes, sir.

Q. Did you hear his testimony wherein he stated that you had been with him and you or he had purchased two drinks of moonshine whiskey from Mrs. Hazelton in the Central Hotel in November, 1922? Did you hear that testimony?

A. I did.

Q. Did any such thing as that happen?

A. Not that I seen.

Q. Did you purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see Grasty purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see anyone purchase any liquor from Mrs. Hazelton?

A. No, sir.

Q. Did you ever see her furnish liquor to anyone?

A. No, sir. (R. p. 80-81.)

Further concerning the testimony of Mr. Grasty the record develops the enlightening fact that the gentleman is an ex-convict, having served a term in the Oregon State Penitentiary for Grand Larceny. We submit that testimony from such an unreliable source, especially when contradicted and impeached by a reliable witness is worthy of no consideration whatever.

ASSIGNMENTS OF ERROR.

I.

The Court erred in sustaining the objection to the following question asked of the witness, W. H. Grasty:

"By Mr. Johnson: Q. You never stated to them that you had bought any liquor or that you were present when any liquor was sold?"

II.

The Court erred in permitting Eugene Gasser to testify as to the records of the Police Court in connection with an alleged arrest of the defendant, Ruth Hazelton.

III.

The Court erred in permitting any evidence in reference to the defendant, Ruth Hazelton, having been arrested by the police of the City of Lewiston and in reference to any alleged beer.

IV.

The Court erred in submitting the case to the jury for the reason that there was a want of evidence to sustain a verdict and in failing to instruct the jury to find for the defendant.

ARGUMENT.

The first three Assignments of Error go to the question as to whether or not a review should be granted by the Appellate Court. We discuss these errors together.

The question on which the first Assignment of Error was based was put for the purpose of showing that the witness, Grasty, had been promised immunity by the police at Lewiston if he would testify against the plaintiff in error.

Shortly after the 6th of November this gentleman had been arrested by the Lewiston police. Prior to the question embraced in the Assignment of Error he was asked the following questions:

> "Q. I will ask you whether or not it was only after the police made some promises to you in your own case that you stated that Mrs. Hazelton had sold you any liquor.
>
> "A. I do not remember just when I told that; I believe that it was after—they made no promises.
>
> "Q. It was after they led you to believe that your interests would be served by testifying against Mrs. Hazelton?
>
> "A. *In a way, yes.* They never came out and openly asked me that question."

Then followed the question upon which the Assignment of Error was based and to which the objection was sustained. And certainly it was proper for the protection of the defendant's rights that this witness should testify as to the fact of his never having made any statement to the police that Mrs. Hazelton had sold him liquor or that any liquor had been purchased when he was present. The question was impeaching in its nature. If the witness had answered the question in the negative the govern-

ment's case would have fallen flat for the reason that he would then on cross-examination have contradicted himself. If he answered the question in the affirmative the way would have been open for rebuttal of his testimony in this regard. Clearly, this is Error that should justify the granting of a new trial.

Concerning the second Assignment of Error, the witness Eugene Gasser, was the Chief of Police of the City of Lewiston. He testified that he searched the hotel in 1922 somewhere around June 21st, that he found fourteen pints of beer therein, and that he arrested the defendant. He was permitted to testify from a police record that Mrs. Hazelton had been convicted on the charge of running a disorderly house. This upon her own plea of guilty. This was erroneous for two reasons. First, the record, itself, was not properly admissible and secondly the admission of testimony to the effect that she had conducted a disorderly house would in no manner support the view that she had been maintaining a nuisance as defined by the statute. If such testimony were admissible for any purpose, it would be to establish a continuity of similar offenses. It must be apparent, however, that the offense of con-

ducting a disorderly house is not similar to an offense wherein it is charged one is maintaining a nuisance by conducting a hotel or rooming house where intoxicating liquor is sold. Examination of the record will show that this testimony failed in any manner to prove any of the issues in the case and that its effect could have been nothing but highly prejudicial upon the jury.

The third Assignment of Error arises out of the testimony of the witness for the government, Eugene Gasser, Chief of Police of the City of Lewiston, and the witness, George W. Welker, Sheriff of Nez Perce County. Both of these men testified as to having made a search of the Central Hotel in June, 1922, and finding therein fourteen pints of beer. Their examination developed that neither of them were able to testify that the so-called beer was of alcoholic content. No analysis of the same was made and both of them after having smelled and tasted it were unable to tell what it was. Certain it is that if this had been beer and of alcoholic content within the provision of the statute the charge of running a disorderly house would never have been placed against the plaintiff in error. She would immediately have been charged under the State law with liquor in possession.

While it is true that the trial court struck the testimony of the Sheriff insofar as the same intended to prove that the beer was actually intoxicating liquor it was highly prejudicial to the rights of the plaintiff in error to have permitted testimony of this kind to have been paraded before the jury. It simply is another evidence of the manner in which the government grasped at straws in order to bring about the conviction of Mrs. Hazelton.

It will be observed that the information as set forth in the third Count, fixed the period of time between June and December, 1922. If the third Count is to be established at all it must be on the testimony of Marler or the testimony of the witnesses, Samuelson and Grasty. The jury by their verdict has shown that there was no possession of liquor or sale of the same by this plaintiff in error on the 6th day of November. The testimony of the witnesses, Gasser and Welker, proves nothing except the futile attempt of the government to present a mass of prejudicial testimony before the jury. The testimony of witnesses, Samuelson and Grasty, has been flatly contradicted and impeached. It has been proven that Mrs. Samuelson was actuated by a desire of revenge; that Grasty was testifying under the promise of immunity.

This brings us to the last Assignment of Error, namely, the want of evidence to sustain a verdict. All of the discussion which has gone before shows conclusively the lack of such evidence. It is the settled practice in the Supreme Court of the United States that want of evidence to sustain a verdict may be considered as grounds for reversal, although no motion or reqeust was made in the lower court to instruct the jury to find for the defendant.

Weiborg vs. U. S., 41 Law Edition, 289.

The above case, which was one of extreme importance, involved a violation of the neutrality laws. The Supreme Court of the United States reviewed the testimony and held it insufficient to sustain the verdict. A reading of that case shows that a much stronger case was presented from an evidentiary standpoint than the one at bar.

Again in the case of *Clyatt vs. U. S.*, 49 Law Edition, 726, the same being a criminal case, the testimony was reviewed by the Supreme Court and the verdict set aside for insufficiency. The opinion contains the following language:

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the im-

> perative duty of a Court to see that all of the elements of his crime are proved or at least that testimony is offered which justifies the jury in finding those elements. Only in the exact administration of law will justice in the long run be done and the confidence of the public in such administration be maintained."

In *Harrison vs. U. S.,* Cir Ct. Ap. 6th Cir, 200 Federal, 662, the Court reviewed a mail fraud case upon the facts and the law and after quoting from the opinion of Justice Brewer in the Clyatt case reversed the judgment of the lower court upon the insufficiency of the testimony and among other things quoted Judge Sanborn, speaking for the Circuit Court of Appeals of the 8th Circuit, 173 Federal, at 740, said:

> "Where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the Appellate Court to reverse the judgment of conviction."

Only a fair and careful reading of these cases will show the application and the attitude of the Court in cases of this kind. The case at bar presents such a striking resemblance as pointed out in the foregoing illustrations that further citation is unnecessary in order to show the utter absurdity in maintaining the judgment in the present case.

An ordinary analysis of the testimony in the case at bar shows that there is a total absence of any well defined issue of fact upon which a jury should be called to pass and no substantial or credible evidence upon which to sustain judgment of the Court.

The Federal Courts have long ago discarded the scintilla of evidence rule and have held time and again that a mere scintilla of evidence is insufficient even in a civil case, much less therefore should it be sufficient in a criminal action, especially where the jurors are instructed and are required before they can convict to believe the defendant guilty beyond a reasonable doubt. This Court must say as a matter of law using its reasoning power and its experience in the law, that there is at least a reasonable doubt as to the innocence or guilt of the defendant and the jury should have so found.

There is in our mind no question of a doubt that if this Court feels that the verdict should not be set aside for lack of evidence that there is at least substantial error in the record to grant a new trial. The permissive introduction of the testimony of the Chief of Police and the Sheriff with reference to finding beer in this woman's hotel is alone sufficient

to justify the granting of a new trial. The instruction of the Court to the jury to disregard the evidence of Sheriff Welker insofar as it tended to prove that this beer was intoxicating liquor did not cure the error in refusing to sustain the objections directed towards the testimony of the Chief of Police on this ground. The jury might well have believed that they were entitled to accept his testimony to the effect that he believed this to be home brew and therefore intoxicating liquor, but even assuming that it was proved beyond doubt that this beer was actually intoxicating liquor the evidence would still be inadmissible for the reason that no attempt was made to show, nor does the third Count allege, that it was "kept" for the purpose of sale. The Federal Courts have held that where it does not appear and is not alleged by the government that intoxicating liquor is kept for the purpose of sale that the mere possession of the same is not sufficient to justify a conviction under the National Prohibition Act on the ground of maintaining a nuisance for the reason that the word "kept" as used in Section 21 of the Act refers to keeping for sale or for other commercial purposes.

U. S. vs. One Cadillac Touring Car, 274 Federal, 470.

We submit upon the whole record that the insufficiency of the evidence in this case presents to this Court a pure question of law for its decision. If we be not sound in this contention we earnestly urge the merit of the argument touching the question of a new trial and are confident that no other jury can be secured to convict upon the testimony of Sadie Samuelson, whose animosity towards the defendant has been proven beyond question and whose testimony has been impeached beyond contradiction nor upon the tesimony of Grasty, an ex-convict, who clearly testified under promises of immunity from punishment for an offense for which he stood charged and who likewise was impeached by the very party whom he claimed purchased the liquor.

Respectfully submitted,

CANNON & M'KEVITT,

Attorneys for Plaintiff in Error.